

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35282

VINCENT BENJAMIN VIDEGAIN,)	2009 Unpublished Opinion No. 604
)	
Petitioner-Appellant,)	Filed: September 9, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Timothy Hansen, District Judge.

Order dismissing application for post-conviction relief, affirmed.

Nevin, Benjamin, McKay & Bartlett, LLP, Boise, for appellant. Dennis A. Benjamin argued.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent. Kenneth K. Jorgensen argued.

PERRY, Judge

Vincent Benjamin Videgain appeals from the district court's order dismissing his application for post-conviction relief. The district court summarily dismissed all but six claims in Videgain's application. Following an evidentiary hearing, the district court denied relief on the remaining issues. For the following reasons, we affirm.

I.

FACTS AND PROCEDURE

Videgain and a co-defendant were charged with attempting to rob a taxi driver at gunpoint. Three shots were fired at the taxi as the driver sped away, causing the driver to crash. Videgain and his co-defendant each accused the other of attempting the robbery and firing the shots. Following a jury trial, Videgain was found guilty of attempted robbery, I.C. §§ 18-6501 and 18-306, with an enhancement for use of a firearm during the commission of a crime, I.C. § 19-2520, and aggravated assault, I.C. §§ 18-901(a), 18-905(a). The district court sentenced

Videgain to a unified term of twenty-five years, with a minimum period of confinement of ten years for attempted robbery and a concurrent five-year determinate term for aggravated assault. Videgain filed a motion for a new trial based on a conversation that his trial counsel overheard wherein counsel for Videgain's co-defendant made statements that may have implicated the co-defendant as the shooter. Videgain's counsel did not call the co-defendant's counsel as a witness at the hearing on the motion for a new trial. The district court denied the motion for lack of admissible evidence that any exculpatory statements had been made. Videgain's judgment of conviction and sentences were affirmed by this Court in an unpublished opinion. *See State v. Videgain*, Docket Nos. 31277 and 32113 (Ct. App. Mar. 15, 2006).

Videgain filed an application for post-conviction relief alleging nineteen claims of ineffective assistance of trial counsel, two claims of ineffective assistance of appellate counsel, and one claim of cruel and unusual punishment. The state moved for summary dismissal arguing that Videgain failed to state any claim upon which relief could be granted or upon which any genuine issue of material fact existed, provided insufficient evidentiary support for his claims, and raised issues which could have been raised on direct appeal. Videgain filed an objection based, in part, on the sufficiency of the notice afforded by the state's motion for summary dismissal. Thereafter, the state filed a reply giving greater detail as to the basis for summary dismissal of Videgain's post-conviction application. Videgain withdrew two claims of ineffective assistance of trial counsel and his claim of cruel and unusual punishment. A hearing was held on the state's motion, and the district court summarily dismissed all but six of the claims. After an evidentiary hearing, the district court dismissed the remaining claims contained in Videgain's application for post-conviction relief. Videgain appeals.

II.

ANALYSIS

A. Summary Dismissal

Videgain argues that the district court erred by summarily dismissing his two claims of ineffective assistance of appellate counsel and eleven of his claims of ineffective assistance of trial counsel. He contends that he did not receive proper notice prior to the dismissal of these claims because, he argues, the district court dismissed them on a ground different from those asserted by the state in its motion. Alternatively, Videgain contends that these claims raised genuine issues of material fact and, therefore, summary dismissal was improper. Preliminarily,

we note that, of the thirteen claims which were summarily dismissed, we need only address four. In the district court, post-conviction counsel conceded that the other nine claims were meritless or could not be proven at the hearing on the state's motion for summary dismissal.¹ The invited error doctrine applies to estop a party from asserting an error when his or her own conduct induces its commission. *State v. Carlson*, 134 Idaho 389, 402, 3 P.3d 67, 80 (Ct. App. 2000). Accordingly, even if the dismissal of these nine claims constituted error either for lack of notice or because they raised genuine issues of material fact, such error was invited and we need not address it. Videgain's remaining four claims that were summarily dismissed are ineffective assistance of trial counsel for failure to recall a defense witness in surrebuttal to challenge the state's rebuttal testimony; failure to advise Videgain of trial strategies and instruct him on how to testify in front of the jury; and ineffective assistance of appellate counsel for failure to raise certain issues on direct appeal and failure to raise a due process violation for use of an allegedly suggestive photo lineup to identify Videgain as the shooter.

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827,

¹ Regarding Videgain's claims of ineffective assistance of trial counsel for failure to hire a forensic specialist on powder burns, failure to cross-examine the lead detective on why Videgain was not given a powder residue test at the time of arrest, failure to obtain a polygraph and powder burn test, failure to hire fingerprint and DNA experts, failure to obtain a psychological evaluation, and failure to present mitigation evidence at the sentencing hearing, post-conviction counsel expressly conceded that they were unable to show any prejudice. Specifically, regarding Videgain's claims relating to powder burns, post-conviction counsel stated: "I don't think we can go anywhere with that, Your Honor. . . . [T]hat doesn't exculpate their guilt at trial. . . . I don't think it would be dispositive of any issue." Concerning Videgain's claim of ineffective assistance of trial counsel for failure to subpoena witnesses of the co-defendant's alleged jailhouse confession, post-conviction counsel conceded that trial counsel could not have acted deficiently by failing to subpoena these individuals because they were not known until after the proceedings had concluded. Regarding Videgain's claim of ineffective assistance of trial counsel for failure to request that the interrogation tape be played for the jury to show the detective's failure to administer powder residue and polygraph tests, post-conviction counsel conceded a lack of prejudice because trial counsel addressed this issue through numerous questions posed at different times and in different ways at trial. Regarding Videgain's claim of ineffective assistance of trial counsel for instructing him not to show empathy or regret toward the victim at sentencing nor to make any statement other than acceptance of the verdict and sentence, post-conviction counsel conceded a failure to show prejudice when he stated: "Obviously, we haven't made a showing that . . . if he did speak what he would say and maybe what effect that would have had on the sentencing."

830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). An application for post-conviction relief differs from a complaint in an ordinary civil action. An application must contain much more than “a short and plain statement of the claim” that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code Section 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court’s own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible only when the applicant’s evidence has raised no genuine issue of material fact that, if resolved in the applicant’s favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987). Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant’s evidence because the court is not required to accept either the applicant’s mere conclusory allegations, unsupported by admissible evidence, or the applicant’s conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file. *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993). In post-conviction actions, the district court, as the trier of fact, is not constrained to draw inferences in favor of the party opposing the motion for summary

disposition; rather the district court is free to arrive at the most probable inferences to be drawn from uncontroverted evidence. *Hayes v. State*, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct. App. 2008).

1. Notice

Pursuant to I.C. § 19-4906(b), the district court may sua sponte dismiss an applicant's post-conviction claims if the court provides the applicant with notice of its intent to do so, the ground or grounds upon which the claim is to be dismissed, and twenty days for the applicant to respond. Pursuant to I.C. § 19-4906(c), if the state files and serves a properly supported motion to dismiss, further notice from the court is ordinarily unnecessary. *Martinez v. State*, 126 Idaho 813, 817, 892 P.2d 488, 492 (Ct. App. 1995). The reason that subsection (b), but not subsection (c), requires a twenty-day notice by the court of intent to dismiss is that, under subsection (c), the "motion itself serves as notice that summary dismissal is being sought." *Saykhamchone v. State*, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995). Idaho Rule of Civil Procedure 7(b)(1) requires that the grounds of a motion be stated with "particularity." If the state's motion fails to give such notice of the grounds for dismissal, the court may grant summary dismissal only if the court first gives the applicant the requisite twenty-day notice of intent to dismiss and the grounds therefore pursuant to I.C. § 19-4906(b). *Flores v. State*, 128 Idaho 476, 478, 915 P.2d 38, 40 (Ct. App. 1996).

Similarly, where "the state has filed a motion for summary disposition, but the court dismisses the application on grounds different from those asserted in the state's motion, it does so on its own initiative and the court must provide the twenty days notice." *Saykhamchone*, 127 Idaho at 322, 900 P.2d at 798. The notice procedure contained in I.C. § 19-4906 is necessary so that the applicant is afforded an opportunity to respond and to establish a material issue of fact if one exists. *Flores*, 128 Idaho at 478, 915 P.2d at 40. If the district court dismisses on grounds not contained in the state's motion, the applicant has no opportunity to respond and attempt to establish a material issue of fact. The Idaho Supreme Court recently addressed the specificity of the notice required by I.C. § 19-4906(c) in *DeRushé v. State*, 146 Idaho 599, 200 P.3d 1148 (2009). However, Videgain does not challenge the sufficiency of the notice given by the state's motion, conceding that the notice was adequate under *DeRushé*. Rather, Videgain contends that the district court summarily dismissed his claims for post-conviction relief on grounds different than those raised by the state in its motion for summary dismissal.

In this case, the state's motion for summary dismissal broadly alleged that Videgain's application lacked supporting affidavits, records, or other evidence; raised issues which could have been, but were not, raised on direct appeal; and failed to state a claim upon which relief could be granted; and that Videgain was not entitled to relief based on the application, the answer, or the record in the case. In reply to Videgain's objection to the sufficiency of the notice, the state filed a response, arguing that the district court was not required to accept Videgain's conclusory allegations or legal conclusions unsupported by admissible evidence. Additionally, the state argued that Videgain had failed to provide evidence in support of his particularized allegations of ineffective assistance of counsel or cruel and unusual punishment. Specifically, the state's reply alleged that Videgain failed to meet the *Strickland*² standard for showing ineffective assistance of counsel because his claims were challenging defense counsel's tactical decisions and failed to show deficient performance or the resulting prejudice. Furthermore, the state contended that, because of the lack of evidentiary support, Videgain had failed to show any issue of material fact requiring an evidentiary hearing. We will consider each of Videgain's four remaining claims individually, as well as the district court's reasons for summarily dismissing them, to ascertain whether the district court summarily dismissed them on grounds different than those asserted by the state in its motion and reply to Videgain's objection as to the sufficiency of notice.

First, we consider Videgain's claim of ineffective assistance of trial counsel for failure to advise him of trial strategies and instruct him on how to testify in front of the jury. In dismissing this claim at the hearing on the state's motion for summary dismissal, the district court held:

I will grant the motion [to summarily dismiss] as to [this claim]. This is basically a conclusory allegation that there was a failure to instruct [Videgain] as to how to testify at trial. There is no allegation as to how [Videgain] may have testified at trial and how that might have affected the manner in which he was perceived by the jury in an absence of any sort of specific allegations. The generalized claim is not grounds for determination of [resulting] prejudice.

The district court was not required to accept Videgain's mere conclusory allegations, unsupported by admissible evidence and, in light of such allegations, summary judgment may be appropriate. *Roman*, 125 Idaho at 647, 873 P.2d at 901. The district court concluded that

² See *Strickland v. Washington*, 466 U.S. 668 (1984).

Videgain's conclusory allegations failed to meet the *Strickland* requirement that he prove that he was prejudiced by counsel's deficient performance. The district court's reason for summarily dismissing this claim falls under the broad umbrella of the state's allegation that Videgain's claims were lacking in supporting affidavits, records, or other evidence, and that Videgain had failed to raise any genuine issues of material fact as to prejudice suffered as a result of counsel's deficient performance.

Next, we consider Videgain's claim of ineffective assistance of trial counsel for failure to recall a defense witness in surrebuttal to challenge the state's rebuttal testimony. At the trial, Videgain's girlfriend testified that she was told that she was a suspect in the robbery and feared that she could lose her children. The state called a detective as a rebuttal witness who testified that Videgain's girlfriend was never told she was a suspect in the robbery. Videgain's application alleges that trial counsel was ineffective for failure to cross-examine the detective on this point and failure to recall his girlfriend to testify as to who told her that she was a suspect and could lose her children. In dismissing this claim, the district court held:

There is no argument in response to the motion to [this claim], but I simply note that there are no allegations that [Videgain's girlfriend] in any respect faced the imminent loss or potential loss of her children; therefore, I can't conclude that the failure to cross examine on that subject resulted in prejudice, so dismissal of [this claim] is appropriate.

The state's motion for summary dismissal and reply to Videgain's objection as to the sufficiency of notice alleged that Videgain had failed to support his claims with admissible evidence and had failed to show prejudice under *Strickland*. The district court dismissed this claim for Videgain's failure to show prejudice through admissible evidence. The district court's ultimate reason for summarily dismissing this claim falls within the scope of the state's responses.

Lastly, we consider Videgain's two claims of ineffective assistance of appellate counsel for failure to raise certain issues on direct appeal and failure to raise a due process violation for use of allegedly suggestive photo lineup to identify Videgain as the shooter. In dismissing these claims, the district court held:

[The claim of failure to raise issues on direct appeal] will be dismissed as it relates to the assertion for the failure to raise the issue of the photo lineup and Miranda. Those issues were not preserved at the trial court level, and for the same reason [the claim of failure to raise the due process violation for use of an allegedly suggestive photo lineup] will be dismissed.

If those issues haven't been preserved at the trial court level, no appellate court is going to consider them upon appeal.

An appropriate approach as it relates to a photo array is to suppress because it is -- well, it comes down to a due process right that is associated with unduly [suggestive] photo arrays that requires a motion to suppress.

That wasn't advanced and so I can't conclude that there is any [resulting] prejudice for the alleged failure of appellate counsel.

In this case, the district court summarily dismissed Videgain's claims of ineffective assistance of appellate counsel because the issue was not properly preserved for appeal and had no chance of success. Therefore, the district court concluded that Videgain had failed to show prejudice. The state's motion for summary dismissal and reply to Videgain's objection as to the sufficiency of notice alleged that Videgain had failed to adequately support his claims with admissible evidence showing how he was prejudiced by any deficient performance by counsel. Once again, the reasons given by the district court fall under the umbrella of the state's allegation that Videgain had failed to show prejudice. Therefore, Videgain received proper notice regarding the summary dismissal of his claims.

2. Genuine issues of material fact

Videgain argues that, even if the grounds for summary dismissal of his claims were the same as those alleged by the state, the district court erred by dismissing them because they raised genuine issues of material fact. However, the issues that Videgain argues merited an evidentiary hearing because they raised genuine issues of material fact were all conceded by post-conviction counsel at the hearing on the state's motion for summary dismissal. Videgain presents no argument or authority as to how the four remaining claims raised any genuine issues of material fact. A party waives an issue on appeal if either argument or authority is lacking. *Powell v. Sellers*, 130 Idaho 122, 128, 937 P.2d 434, 440 (Ct. App. 1997). Therefore, we do not further address this argument.

B. Evidentiary Hearing

Several of Videgain's post-conviction claims survived summary dismissal and proceeded to an evidentiary hearing. After the presentation of some of the evidence at the evidentiary hearing, the state moved for involuntary dismissal of Videgain's claims. The district court granted the motion for all but three of the claims. After the evidentiary hearing, the three remaining claims were also dismissed. Videgain argues that the district court erred by

dismissing his claim of ineffective assistance of trial counsel for failure to subpoena the trial counsel of his co-defendant to testify at the hearing on Videgain's motion for a new trial concerning statements he was alleged to have made implicating the co-defendant as the shooter.

In order to prevail in a post-conviction proceeding, the applicant must prove the allegations by a preponderance of the evidence. I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216 (1990). When reviewing a decision denying post-conviction relief after an evidentiary hearing, an appellate court will not disturb the lower court's factual findings unless they are clearly erroneous. I.R.C.P. 52(a); *Russell v. State*, 118 Idaho 65, 794 P.2d 654 (Ct. App. 1990). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. *Larkin v. State*, 115 Idaho 72, 73, 764 P.2d 439, 440 (Ct. App. 1988). We exercise free review of the district court's application of the relevant law to the facts. *Nellsch v. State*, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992).

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Aragon*, 114 Idaho at 761, 760 P.2d at 1177. This Court has long-adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

At the evidentiary hearing, Videgain presented testimony from himself and three other witnesses. None of these witnesses specifically addressed trial counsel's failure to subpoena co-defendant's counsel. The state then presented evidence from Videgain's trial counsel. Videgain's trial counsel, among other things, testified as to the events surrounding his failure to

subpoena co-defendant's counsel to testify at the hearing on Videgain's motion for a new trial. In its order dismissing the remainder of Videgain's post-conviction claims after an evidentiary hearing, the district court found:

[Trial counsel] wasn't able to have [co-defendant's counsel] served with a subpoena for the hearing on [Videgain's] Motion for New Trial. In fact, he did not even attempt to have [co-defendant's counsel] served until the date of the hearing. At the evidentiary hearing . . . [trial counsel] testified that the reason for the delay in having [co-defendant's counsel] served was his concern that any prior notice would allow [co-defendant's counsel] to prepare a response to [trial counsel's] questions, and, thereby, ruin the "element of surprise."

. . . . However, it is clear from [trial counsel's] un rebutted testimony that the delay in attempting to serve [co-defendant's counsel] with a subpoena was a strategic decision. In hindsight, this decision was not the correct one. However, the stated reason for the decision does not establish inadequate preparation or ignorance of any applicable law. Therefore, the Court cannot find that [trial counsel's] performance was deficient.

Videgain argues that the district court erred by relying on the testimony of his trial counsel because the testimony was "inherently incredible." He contends that the district court should not have accepted such testimony, even if it was un rebutted. Furthermore, Videgain contends that his trial counsel's statements at the evidentiary hearing were inconsistent with his prior statements and, even if true, the tactical decision was based on inadequate preparation or ignorance of the law. However, we need not address Videgain's arguments that his trial counsel's performance was deficient. Even were we to accept that Videgain met his burden of proof that trial counsel's performance was deficient, he has failed to meet his burden of proving that he was prejudiced by any deficiency.

The only evidence presented at the evidentiary hearing concerning the prejudice suffered by trial counsel's alleged deficient performance for failing to subpoena co-defendant's counsel came from the testimony offered by Videgain's trial counsel. When trial counsel was cross-examined concerning the hypothetical result if co-defendant's counsel had been subpoenaed, the following exchange took place:

[POST-CONVICTION COUNSEL]: Had [co-defendant's counsel] shown up for that hearing what would you have hoped to have shown . . . ?

[TRIAL COUNSEL]: I would have hoped he would have gotten on the stand to say "[Trial Counsel's] affidavit is perfectly correct, so I betrayed my clients. Uh, I did admit that he was involved in a serious crime that could land

him in the State Penitentiary, and I'll state it under oath and happy to do it." And frankly, I don't think he's going to do that.

[POST-CONVICTION COUNSEL]: How, in your mind would that have been admissible at trial -- or admissible over a hearsay objection . . . ?

[TRIAL COUNSEL]: I don't believe it would be It was a very weak motion, uh, but it was all we had.

In light of this uncontroverted testimony presented at the evidentiary hearing, the district court found:

In addition, [Videgain] has failed to prove by a preponderance of the evidence that the failure to have [co-defendant's counsel] in court at the time of the hearing on [Videgain's] Motion for New Trial would have affected the outcome. [Videgain's] conclusory statement in his Closing Memorandum that [co-defendant's counsel's] statements were almost certainly the result of information from [co-defendant] is speculative and without foundation. That was part of the reason why the Court originally denied [Videgain's] Motion for New Trial. Furthermore, the only evidence concerning the likelihood of success of [Videgain's] Motion for New Trial had [co-defendant's counsel] been present, was [trial counsel's] un rebutted testimony that the motion was weak and, even if [co-defendant's counsel] had testified, he would have just declined to answer. Consequently, [Videgain] has failed to prove prejudice due to [co-defendant's counsel's] absence at the hearing. Therefore, [trial counsel] did not provide ineffective assistance of trial counsel as asserted in the third claim.

Based on the evidence presented at the evidentiary hearing, Videgain failed to meet his burden of proving that trial counsel's performance was deficient and that he was prejudiced thereby. Trial counsel testified that the motion for new trial was weak and had little probability of success. Additionally, trial counsel testified that, even if he had subpoenaed co-defendant's counsel, he likely would have refused to make statements implicating his client. Therefore, the district court did not err by dismissing this claim after an evidentiary hearing.

III.

CONCLUSION

The district court's stated reasons for summarily dismissing Videgain's claims for post-conviction relief fell under the broad umbrella of the state's allegations raised in its motion for summary dismissal and reply to Videgain's objection as to the sufficiency of notice. Therefore, Videgain received proper notice regarding the summary dismissal of these claims. Videgain fails to provide any argument or authority as to how his post-conviction claims, that were not conceded at the hearing on the state's motion to summarily dismiss, raised any genuine issue of

material fact. Videgain failed to meet his burden of proving that, even if trial counsel performed deficiently, he was prejudiced by trial counsel's failure to subpoena co-defendant's counsel regarding alleged statements he made implicating his client as the shooter. Therefore, the district court's order summarily dismissing Videgain's application for post-conviction relief in part, without an evidentiary hearing, and dismissing Videgain's application for post-conviction relief, in part, after an evidentiary hearing, are affirmed. No costs or attorney fees are awarded on appeal.

Chief Judge LANSING and Judge GUTIERREZ, **CONCUR.**